* **HIGH COURT OF DELHI : NEW DELHI**

\+ **ITA No. 612 of 2006**

Judgment reserved on: July 09, 2007

% Judgment delivered on: July 25, 2007

Marvel Polymers Pvt. Ltd.
Flat No.321, Allied House,
Inderlok Chowk, Delhi-110035. ...Appellant

Through Mr.Deepak Aggarwal with
Mr. R.K. Chauhan

Versus

Commissioner of Income Tax – II
New Delhi. ...Respondent

Through Mr. R.D. Jolly

Coram:

HON'BLE MR. JUSTICE MADAN B. LOKUR
HON'BLE MR. JUSTICE V.B. GUPTA

1. Whether the Reporters of local papers may be allowed to see the judgment? Yes

2. To be referred to Reporter or not? Yes

3. Whether the judgment should be reported in the Digest? Yes

MADAN B. LOKUR, J.

The Assessee is aggrieved by an order dated 4th January,

2004 (since rectified to read 4th January, 2005) passed by the Income Tax Appellate Tribunal, Delhi Bench 'E' in ITA No.3770/Del/2001 relevant for the assessment year 1998-99.

2. The Assessee, as per its Memorandum and Articles of Association, was set up to engage itself in the business of manufacture of footwear and footwear parts as well as trading of goods.

3. The Assessee claimed some expenditure in the profit and loss account (including depreciation) but the Assessing Officer disallowed it on the ground that the Assessee had not been set up and had not commenced any business activity during the relevant previous year.

4. The Assessee preferred an appeal which was allowed by the Commissioner of Income Tax (Appeals) who held that the Assessee had commenced its business during the relevant previous year and, therefore, the Assessing Officer was directed to allow the expenses, as claimed in the profit and loss account.

5. Against the order passed by the Commissioner, the Revenue preferred an appeal to the Income Tax Appellate Tribunal which allowed the appeal and that is how the Assessee is before us under Section 260-A of the Income Tax Act, 1961.

6. Learned counsel for the Assessee contended that there are several factors which go to show that not only had the Assessee been set up but that it had commenced business during the relevant year. It was submitted that a completion certificate had been obtained for the structure that the Assessee had built up; the Assessee had obtained an electric connection and excise licence; it was registered with the Director of Industries as a small scale industry; it had been granted a Registration Certificate with the Sales Tax department; it had purchased raw materials and it was registered with the Regional Provident Fund Commissioner.

7. We find that the Tribunal has considered all these facts, including the contentions made on behalf of the Revenue by the Departmental Representative.

8. It has been found, as a matter of fact, that the only business activity conducted by the Assessee, whose principal activity was to manufacture footwear and footwear parts, was to have purchased 84 pairs of shoes / footwear for Rs.2,660/-, which were later sold for Rs.3,127/-. This was the solitary transaction of purchase and sale of footwear. The Assessee appears to have admitted that it was necessary for it to have had at least one transaction for the purposes of registration with the Sales Tax department and that is why this transaction was entered into. Clearly, the solitary transaction by the Assessee was not as a part of its trading activity but was for the purposes of getting registration from the Sales Tax department. Reliance, therefore, cannot be placed by the Assessee on this transaction to substantiate its claim of having commenced trading activity.

9. In so far as the manufacturing activity is concerned, while it is true that the Assessee was granted a completion certificate by the Municipal Corporation of Delhi in respect of the structure built by it and was also granted an electric connection but the fact remains that it was granted a excise licence only on 31st March,1998, the last day of the

relevant previous year. No labour was employed by the Assessee prior to this date and its employees were recruited only with effect from 1st April, 1998. Registration with the Provident Fund Commissioner was also with effect from 1st April, 1998. Clearly, no labour, either skilled or unskilled, was available with the Assessee for carrying out any manufacturing activity prior to 1st April, 1998. Even otherwise, there was nothing on facts to suggest that the Assessee had taken any substantive steps which could lead to the inference that the business of the Assessee had been set up or had commenced during the relevant previous year.

10. In ***Commissioner of Wealth Tax, Madras v. Ramaraju Surgical Cotton Mills Ltd., [1966] 62 ITR 21***, the Supreme Court drew a distinction between "setting up" and "commencement". It was held that "setting up" is a stage anterior to "commencement". The actual functioning of a factory or its going into production is not necessary for concluding that a factory has been set up. The Supreme Court accepted the view that the proper meaning to be assigned to the expression "set up" would be "ready to commence business", that is to say that a unit

cannot be said to have been set up unless it is ready to discharge the function for which it was being set up. It is only when the unit has been put into such a shape that it can start functioning as a business or a manufacturing organisation that it can be said that the unit has been set up. Of course, the Supreme Court was dealing with the Wealth Tax Act, but the principles laid down by it would be equally applicable to the present case.

11. Applying the law laid down by the Supreme Court, it would appear that on paper the factory of the Assessee had been "set up" but in actual fact, it would be difficult to accept the proposition that the unit was ready to discharge the function for which it was set up. This is because on the basis of the cumulative facts available on record such as the fact that the excise licence was granted only on 31st March, 1998 and employees were recruited only on 1st April, 1998 there was no way that the Assessee could be said to have been in such a position that on 31st March, 1998, it was ready to commence its business activity. Even though it may have had an electric connection and had purchased some raw material, there was no one to take advantage of it.

12. The Tribunal has come to the conclusion that the facts of the case are rather peculiar but the total effect of all these facts and the law laid down by the Supreme Court point to the conclusion that it is not possible to entirely agree with the views expressed by learned counsel for the Assessee. The opinion expressed by the Tribunal is a possible view. It is not perverse in the sense that no reasonable person could have reached the conclusion that the Tribunal did in view of the facts of the case, peculiar or not.

14. Under these circumstances, we are of the view that no substantial question of law arises for consideration. The view expressed by the Tribunal may or may not be correct but that by itself does not raise a substantial question of law.

15. Dismissed.

Madan B. Lokur, J

July 25, 2007 **V.B. Gupta, J**
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